

PATRICK E. MCKELVEY

IBLA 93-210

Decided April 21, 1998

Appeal from a decision of the Montana State Office, Bureau of Land Management, declaring the Ubet lode mining claim abandoned and void for failure to file evidence of assessment work on or before December 30, 1992, due to late payment of the service charge. M MC 46410.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim—Mining Claims: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold

In accordance with 43 C.F.R. § 3833.1-3 (1992), annual filings for mining claims must be accompanied by a nonrefundable service charge of \$5 for each claim. Annual filings received by BLM on or after Jan. 1, 1991, which were not accompanied by the proper service charges were, according to 43 C.F.R. § 3833.1-4(b) (1992), not to be accepted and were to be returned to the claimant/owner without further action. Thus, there could be no timely annual filing without the accompanying service charge, and if the filing deadline passes without proper payment, the claims were properly declared abandoned and void.

APPEARANCES: Patrick E. McKelvey, Helena, Montana, pro se.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Patrick E. McKelvey has appealed a January 11, 1993, Decision of the Montana State Office, Bureau of Land Management (BLM), declaring the Ubet lode mining claim (M MC 46410) abandoned and void for failure to file evidence of assessment work or a notice of intention to hold the claim on or before December 30, 1992, as required by 43 U.S.C. § 1744 (1994), and

43 C.F.R. § 3833.2-2. ^{1/} The BLM noted that an affidavit for the claim had been received on January 4, 1993, but had been returned because it was not accompanied by a \$5 service charge. The BLM determined that the affidavit subsequently received on January 7, 1993, with payment of the service charge had been transmitted no earlier than January 6, 1993, and was not timely filed.

In his notice of appeal, Appellant states that he was unaware of the requirement to pay a \$5 fee and was not informed of the fee in any of several documents BLM sent him. (Notice of Appeal at 1-3.) He argues that his affidavit was received on January 4, 1993, the first business day of the new year, and that it was timely received, having been transmitted the previous week. (Notice of Appeal at 2.) He contends that late payment of the service charge should not be sufficient to support a finding of abandonment of the claim. *Id.* Appellant additionally argues that both the affidavit and service charge were received on January 7, 1993, within the period defined by 43 C.F.R. § 3833.0-5(m), and should be accepted as timely filed since the affidavit was originally mailed prior to the deadline. *Id.* An additional statement filed with the Board repeats these arguments. In particular, Appellant points out that BLM's Decision addresses the affidavit received on January 7, 1993, but this was the second time he mailed the document, as it was first "mailed to the BLM on or before December 30, 1992."

With his notice of appeal, Appellant has submitted the affidavit of assessment work he apparently mailed to BLM. It is date-stamped as received by BLM on January 4, 1993, at 9 a.m.; however, over the date-stamp is a second stamp: "DATE STAMP CANCELLED DUE TO NONPAYMENT OF SERVICE FEES DOCUMENT RETURNED." The case file also contains Appellant's cover letter dated January 6, 1993, stating that he was returning the affidavit with the \$5 service charge. A copy of the affidavit and an envelope with an illegible postmark are attached to it.

As noted by BLM, section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA) and Departmental regulations require the owner of an unpatented mining claim to file evidence of assessment work or a notice of intention to hold the mining claim with the proper BLM office prior to December 31 of each year following the year in which the claim is located. 43 U.S.C. § 1744 (1994); 43 C.F.R. § 3833.2-2. The statute also provides that failure to file one of the two instruments within the prescribed time conclusively constitutes an abandonment of the mining claim. 43 U.S.C. § 1744(c) (1994); 43 C.F.R. § 3833.4(a). Beginning January 3, 1989, the Department implemented a requirement that the annual filing "shall be accompanied by a nonrefundable service charge of \$5.00 for each mining

^{1/} Because the regulations have undergone a series of revisions, *see* note 2, *infra*, the regulations applicable to this appeal are identified as those in the 1992 edition of the C.F.R. regardless of whether they have been changed or remain the same in the current 1995 edition.

claim, millsite, or tunnel site." 53 Fed. Reg. 48876, 48881 (Dec. 2, 1988), codified at 43 C.F.R. § 3833.1-3(c). The regulations provided that, until January 1, 1991, a filing not accompanied by the service charge "shall be noted as being recorded on the date received provided that the claimant submits the proper service charge within 30 days of receipt of such deficiency notice by the authorized officer." 53 Fed. Reg. 48876, 48878 (Dec. 2, 1988), codified at 43 C.F.R. § 3833.1-4(a). Beginning January 1, 1991: "Filings that are not accompanied by the proper service charges * * * shall not be accepted and will be returned to the claimant/owner without further action." Id., codified at 43 C.F.R. § 3833.1-4(b) (1992). 2/

[1] The applicable regulation regarding this appeal is 43 C.F.R. § 3833.1-3 (1992), which provides that annual filings "shall be accompanied by a nonrefundable service charge of \$5 for each mining claim, millsite, or tunnel site." As already indicated, 43 C.F.R. § 3833.1-4(b) (1992) provided that as of January 1, 1991, filings "not accompanied by the proper service charges" were unacceptable and would be returned to the claimant. We observed in M & A Mining, Inc., 130 IBLA 333, 334 (1994), that "[b]ased on those regulations, it is clear that there can be no timely annual filing without the accompanying service charge" citing Norman Filip, 124 IBLA 122 (1992), and Park City Chief Mining Co., 57 IBLA 346 (1981) (recording of

2/ Initially a \$5 per claim service fee was required only for filing a location certificate. 42 Fed. Reg. 5298, 5301 (Jan. 27, 1977), codified at 43 C.F.R. § 3833.1-2(d). Effective Mar. 19, 1979, BLM modified the regulation to specify that a location certificate not accompanied by the fee would be returned to the claim owner. 44 Fed. Reg. 9720, 9722 (Feb. 14, 1979). The 1982 revisions to the regulations added the definition of "timely filed" and also provided that a location certificate received without the service fee would be recorded on the date received if the fee was paid within 30 days of receiving notice, otherwise the certificate would be rejected and returned to the claim owner. 47 Fed. Reg. 56300, 56305 (Dec. 15, 1982), codified at 43 C.F.R. § 3833.1-2. When a \$5 service charge for other filings was established effective Jan. 3, 1989, the fee for filing a location certificate was raised to \$10. 53 Fed. Reg. 48876, 48878 (Dec. 2, 1988), codified at 43 C.F.R. § 3833.1-3. The BLM provided that it would continue to give a deficiency notice until Jan. 1, 1991, and, as quoted above, after that date filings without service charges would be returned. Id., codified at 43 C.F.R. § 3833.1-4 (1989).

After enactment of the Department of the Interior and Related Agencies Appropriations Act for Fiscal 1993, Pub. L. No. 102-381, 106 Stat. 1374 (1992), the Department again revised the regulations to provide that effective July 15, 1993, the failure to pay a service charge is curable, and the document will be "recorded on the date received provided that the claimant submits the proper service charge within 30 days of receipt of a deficiency notice from the authorized officer." 58 Fed. Reg. 38186, 38198 (July 15, 1993), codified at 43 C.F.R. § 3833.1-3(c) (1993).

a mining claim required to be accompanied by a service fee and there could be no recordation without payment of the fee). Moreover, if the annual filing deadline passes without the filing of the service charge, BLM may properly declare the mining claims abandoned and void. Id. Because the initial filing was not accompanied by the service charge, under the regulations in effect on January 1, 1992, that filing was unacceptable. Since the subsequent submission was untimely, BLM properly held the claim abandoned and void.

Responsibility for complying with the recordation requirements of FLPMA rests with the owner of the unpatented mining claim as Congress mandated that failure to file the proper documents in the proper offices within the time periods prescribed in section 314 of FLPMA will, in and of itself, cause the claim to be lost. The Supreme Court has upheld the constitutionality of the statute, expressing that a claim for which timely filings are not made is extinguished by operation of law notwithstanding the claimant's intent to hold the claim. See United States v. Locke, 471 U.S. 84 (1985).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the January 11, 1993, Decision of the Montana State Office is affirmed.

James P. Terry
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

